STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

KEITH HUBBARD,

Plaintiff-Appellee,

Supreme Court Case No. 127240

vs.

Court of Appeals Case No. 246165
Lower Court Case No. 01-115388-NO

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK, a District of Columbia corporation,

Hon. Gershwin Drain

Defendant-Appellant.

/

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REPLY OF DEFENDANT/APPELLANT RELATIVE TO APPLICATION FOR LEAVE TO APPEAL

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REPLY STATEMENT OF JUDGMENT OR ORDER APPEALED FROM AND RELIEF SOUGHT

In his response, plaintiff objects to Amtrak's characterization of plaintiff's claim as "a 'negligent design' case under the Federal Employer (sic) Liability Act..." (Plaintiff-Appellee's Response to Defendant-Appellant's Application for Leave to Appeal, pg. iii). Amtrak's characterization of plaintiff's sole surviving claim under the Federal Employers' Liability Act as a "negligent design" claim is supported by the decision of the Court of Appeals, which plaintiff did not appeal. Specifically, the Court of Appeals stated: "In his Complaint, plaintiff alleged other bases for defendant's negligence. Because plaintiff's appeal only involves defendant's alleged negligence regarding the design of the cab seat, we limit our review of the trial court's decision accordingly." (Court of Appeals' Opinion, pg. 2, fn 1) (emphasis added). Thus, plaintiff's negligent design claim under the FELA is all that survived the Court of Appeals' review of the trial court's summary disposition of plaintiff's entire case. The Court of Appeals characterized this negligence design claim as negligence based on Amtrak "...allowing the train to be equipped with a seat that locked into position, thereby preventing him from timely exiting the cab seat in the event of a collision." (Court of Appeals' Opinion, pg 2) (footnote omitted).

The Court of Appeals having articulated the limitations of plaintiff's sole surviving claim, the bases for Amtrak's Application for Leave to Appeal are:

1. MCR 7.302(B)(5): The Court of Appeals' decision conflicts with this Court's opinion in *Smith v. Globe Life Insurance Company* (460 Mich. 446 (1999)), MCR 2.116 (G)(6), MRE 701 and MRE 801(d)(2); and

2. Federal Preemption: The Court of Appeals' decision is clearly erroneous where federal law occupies the entire field regulating locomotive equipment, thus preempting plaintiff's FELA claim relating to locomotive equipment, pursuant to *Thirkill v. Hunt Transport., Inc.*, 950

F. Supp. 1105 (N.D. Ala 1996); and *Waymire v. Norfolk & Western Ry. Co.*, 218 F. 3d 773 (7th Cir. 2000), cert denied 531 U.S. 1112 (2001). The Court of Appeals' decision is grossly inconsistent with federal caselaw and material injustice will occur to the jurisprudence of this state if the decision is not reversed.

REPLY STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals' decision is in direct conflict with this Court's decision in *Smith v. Globe*, 460 Mich. 446 (1999) where it reversed the trial court's summary disposition of plaintiff's negligent seat design claim under the FELA without requiring evidentiary proofs creating a genuine issue of material fact.

II. Whether the Court of Appeals' decision is clearly erroneous and will cause material injustice to the jurisprudence of this state where it directly conflicts with federal caselaw holding that federal law governing locomotive equipment preempts an FELA claim based on negligent locomotive seat design.

REPLY STATEMENT OF MATERIAL PROCEEDINGS

Plaintiff failed to address Amtrak's discussion pointing out that, while he initially appeared to pursue a scattershot approach to his FELA claim (Defendant's Application for Leave to Appeal, pgs. 2-3), at the trial court's summary disposition hearing, plaintiff limited his claim to negligent seat design. (Id., pg. 3). The Court of Appeals recognized this limitation in its decision. (Pg. 2, fn 1). Plaintiff also failed to address the fact that the trial court granted summary disposition as to all of his claims, including those under the Locomotive Inspection Act, which summary disposition the Court of Appeals affirmed with one exception: the FELA negligent seat design claim. (Court of Appeals' decision, pgs. 1; 2, fn 1; 5).

Plaintiff also failed to address, anywhere in his response, defendant's arguments in support of its Application for Leave which cite to two separate bases for granting leave: the conflict between the Court of Appeals' decision and *Smith v. Globe Life Insurance*, which requires a party responding to a motion for summary disposition to present evidentiary proofs creating a genuine issue of material fact; and the clearly erroneous decision by the Court of Appeals to ignore federal caselaw which holds that federal law preempts plaintiff's FELA claim. While plaintiff did mention briefly the *Smith* issue in his response (pg. iii), he wholly failed to address this second basis for reversal of the Court of Appeals' decision, set forth in Amtrak's application.

REPLY ARGUMENT

In his response to Amtrak's Application, plaintiff devotes the lion's share of the argument section to discussing the purpose of the Federal Employers' Liability Act--which is not at issue here. Plaintiff devotes not one page, let alone one line, of his argument to the issues raised by Amtrak: whether the Court of Appeals' decision conflicts with *Smith v. Globe* and the court

rules when it failed to require evidentiary proofs creating a genuine issue of material fact; and whether that decision ignores federal preemption caselaw.

I. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH *SMITH V. GLOBE*, THE COURT RULES AND THE RULES OF EVIDENCE:

Plaintiff does not dispute Amtrak's analysis of the FELA. (Amtrak's Application, pgs. 19-21). Plaintiff did, however, ignore and fail to address Amtrak's argument at page 23 as to the crucial language articulated by this Court establishing the requirements for a party responding to a summary disposition motion brought under MCR 2.116(C)(10), set forth in *Smith v. Globe Life Ins. Co.*, 460 Mich. 446, 455 (1999), to wit:

> ...a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted. MCR 2.116(G)(4). (Emphasis added).

Nor did plaintiff address the myriad deficiencies cited by Amtrak in each of the items of "evidence" proffered by plaintiff in his summary disposition response, and relied on by the Court of Appeals in reversing summary disposition.

Specifically, plaintiff failed to address deficiencies in the following items of "evidence" cited by the Court of Appeals in reversing summary disposition on plaintiff's negligent seat design claim under the FELA:

1. The testimony of plaintiff and Ronald Black that the seat was unsafe as employed. (Court of Appeals' decision, pg. 5).

Plaintiff neglected to address, let alone refute, Amtrak's argument that plaintiff cannot offer these opinions where: plaintiff and Black were neither experts nor listed as experts; and these opinions do not qualify as lay opinions under MRE 701. (Amtrak's Application, pg. 24). As Amtrak noted, the Michigan Rules of Evidence do permit the admission of lay witness'

opinion--but only to the extent that the opinion is rationally based on the perception of the witness. However, plaintiff admitted his testimony was based on his opinion that cab cars are not "crashworthy" (Amtrak's Application, Exhibit 3, pg. 94), as distinct from an opinion on the seat, even though he admitted he had no actual knowledge of cab car strength. (Id.). Similarly, Black admitted he was not aware of any accidents involving the cab car structure presenting a danger to occupants. (Amtrak's Application, Exhibit 5, pgs. 41-42).

Further, plaintiff failed to address Amtrak's argument that lay testimony by trainmen as to improper design and safety is not admissible as either lay or expert testimony. (Amtrak's Application, pgs. 26-27). In support of this argument, Amtrak cited to *Rice v. Cincinnati, New Orleans & Pacific Ry. Co.*, 920 F. Supp. 732 (E. D. Ky 1996); *Thirkill v. J. B. Hunt Transport. Inc.*, 950 F. Supp. 1105 (N. D. Ala 1996); and *Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S. D. Ala 1999) (all cited by Judge Zahra in his dissent in the Court of Appeals' decision), none of which plaintiff addressed in his response. Each of these cases is similar to the present case where the FELA plaintiff in each case sought recovery based on equipment not required by federal statute or regulation. In *Rice* and *Thirkill*, the respective courts flatly rejected the testimony of plaintiff and his co-workers as to the unsafe condition. In *Rice*, the Court stated plaintiff and his co-worker "...do not possess the qualifications to offer expert opinions that the car design is unsafe." *Rice* at 737. In *Thirkill*, the Court held that "Neither the plaintiff nor fellow crewmen are qualified to testify as design experts." *Thirkill* at 1107.[1]

[1] The dispositive import of these cases is, perhaps, the motivation for plaintiff's attempts in his response (pgs. iii, 1) to transform his claim from the plaintiff-admitted and Court of Appeals-designated "negligent seat design" claim.

Thus, since neither plaintiff nor Black are experts or were designated as experts, any opinion by them that the seat is unsafe would not be admissible. Similarly, their lay opinion is not based on their perception and is therefore inadmissible. Finally, they lack the qualifications to give any testimony on safety and/or negligent seat design. Therefore, the Court of Appeals' decision to reverse summary disposition based on inadmissible testimony of plaintiff and Black is in direct conflict with *Smith, supra*.

2. Black's testimony about numerous complaints of engineers the safety concerns about the locking cab car seat. (Court of Appeals' decision, pg. 5). In citing to this testimony, the Court of Appeals stated (erroneously) that "Beginning in 1994, Black was designated to handle concerns regarding defendant's cab cars in Detroit." (Id., fn 3).

Plaintiff failed to address Amtrak's argument that these purported complaints were "vague." (Amtrak's Application, pg. 29). Nor did plaintiff explain how or why these complaints would not be inadmissible hearsay. Nor did plaintiff address the argument that, under *Rice* and *Thirkill*, since neither he nor Black can testify about seat safety and design, the hearsay statements of co-workers would also be inadmissible.

Further, plaintiff failed to refute Amtrak's argument that Black was not part of a committee formed by Amtrak to review cab car complaints. (Amtrak's Application, pg. 15). This incorrect statement was initially propounded by plaintiff in his Court of Appeals Brief (page 7). Unfortunately, the Court of Appeals adopted it as truth. (Court of Appeals' decision, pg. 5, fn 3). The Court of Appeals, however, reached the wrong conclusion as to Mr. Black and the committee. According to his testimony, Mr. Black was a union member who was "on the local committee of adjustment." He testified, specifically, that it was not a safety committee, not a special committee and not a committee designated to compile complaints on cab cars. (Amtrak's

Application, Exhibit 5, pg. 32). It was, according to Mr. Black, "just a union position." (Id.). Obviously, Mr. Black's status as a holder of a union position does not elevate his testimony relative to vague hearsay complaints to a level of admissible testimony.

3. The interoffice memo of September 11, 1990.

Other than the inadmissible testimony of plaintiff and Black (including hearsay), the only other additional evidence cited by the Court of Appeals in reversing summary disposition was the September 11, 1990 "Interoffice Memorandum," attached to Amtrak's Brief on Appeal, Exhibit 9. (Court of Appeals' decision, pg. 5). Plaintiff failed to address Amtrak's numerous objections to the admissibility of this document: it was never authenticated; no witness laid any foundation for its admission; it could have been typed by anyone; it is not signed by Mr. LaClair; it is clearly hearsay.

Nor did plaintiff address Amtrak's argument that this document is not admissible under MRE 801(d)(2) or 803(6), as the Court of Appeals held. (Court of Appeals' decision, pg. 5). This holding is wholly inconsistent with this Court's holding in *Smith, supra*, where there is and was no admissible testimony or affidavit by a qualified witness to establish the elements of either MRE 801(d)(2) or 803(6). The Court of Appeals, contrary to *Smith, supra*, ignored the Michigan Rules of Evidence when it relied on the 1990 memorandum to support reversal of summary disposition on plaintiff's FELA negligent seat design claim.

II. THE COURT OF APPEALS' DECISION IS CLEARLY ERRONEOUS WHERE FEDERAL LAW OCCUPIES THE ENTIRE FIELD REGULATING LOCOMOTIVE EQUIPMENT, THUS PREEMPTING PLAINTIFF'S FELA CLAIM RELATING TO LOCOMOTIVE EQUIPMENT:

In his response, plaintiff wholly failed to address Amtrak's preemption argument. (Amtrak's Application, pgs. 33-40). Plaintiff does not dispute that he presented no evidence, admissible or not, that the use of a "lockable" seat violated any federal statute or regulation. Nor

did he present evidence that the seat was negligently maintained or defective. Rather, the issue raised by Amtrak in its Application is a reiteration of the argument repeatedly raised below.[2] The argument is that where federal law occupies the field of locomotive equipment and where the subject equipment is in compliance with that federal law, an FELA claim alleging negligence based on the use of that compliant equipment is preempted. This argument was not addressed by the Court of Appeals in its one paragraph discussion of Amtrak's preemption argument. (Court of Appeals' decision, pg. 2, last (fourth) paragraph). In that discussion, the Court of Appeals initially notes that Amtrak's "...argument does not implicate the preemption doctrine because plaintiff's cause of action involves no state law claim. Rather, the issue involves the interaction of two federal statutes." (Id.) (citation omitted). While the Court of Appeals did cite to *Weaver v. Missouri Pacific Railroad Co.*, 152 F. 3d 427 (5th Cir. 1998), it ignored all the cases, cited by Amtrak in its appeal brief, which were issued after *Weaver*, in which courts held that federal law did preempt FELA claims where the railroad was in compliance with federal law and/or regulations, as is the case here. See, e.g., *In re Amtrak "Sunset Limited," supra*; and *Norfolk Southern Ry. Co. v. Denson*, 644 50 2d 549 (Ala 2000). See, also, *Waymire v. Norfolk & Western Railway Co.*, 218 F. 3d 773 (7th Cir. 2000). The language in *In re Amtrak* is illustrative of this line of cases, ignored by the Court of Appeals here, that: "FELA claims of negligence as to locomotive design were pre-empted where locomotive complied with federal statute and regulations." (*In re Amtrak* at 1349, citing to *Key v. Norfolk So. Ry.*, 228 GA App 305 (1997).

The Court of Appeals, in citing to *Weaver, supra*, ignored the clear distinctions between *Weaver* and the present case. The first, sharp, distinction is that in *Weaver*, the railroad

[2] Defendant raised federal preemption in its affirmative defenses (no. 8); in its motion for summary disposition (pg. 3, paragraph 19) and its brief in support (pgs. 11-13); and in its Brief on Appeal to the Court of Appeals (pgs. 20-38).

specifically conceded that preemption was not at issue (*Weaver* at 429); here, Amtrak has asserted federal preemption from its first pleading in the trial court. (See fn 6, pg. 2, *supra*). The second distinction is that the subject regulations in *Weaver* did not address the known danger at issue; here, the regulation--requiring a secure and braced seat (49 C.F.R. 229.141)--is directly implicated by plaintiff's claim that cab car seats should not be secured and braced.

Plaintiff's response ignores the errors of the Court of Appeals in misunderstanding Amtrak's preemption defense and argument based on clear federal decisional law which requires dismissal of plaintiff's negligent seat design claim.

RELIEF REQUESTED

For the reasons set forth in defendant-appellant's Application for Leave to Appeal, Amtrak respectfully requests that this Court:

1. Grant this Application for Leave to Appeal;

2. Upon leave granted, reverse the decision of the Court of Appeals as to:

   a. Its reversal of the trial court's summary disposition of plaintiff's negligent seat design claim under the FELA; and

   b. Its remand to the trial court of plaintiff's negligent seat design claim under the FELA.

3. Remand the matter to the Court of Appeals for the purpose of entering an order affirming the judgment of the trial court granting defendant-appellant's Motion for Summary Disposition on all issues.

Respectfully submitted,

DURKIN, McDONNELL, CLIFTON
& O'DONNELL, P.C.

DATED: December 8, 2004

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